

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF MASSACHUSETTS

JOAN L. SMITH,)	
)	
Plaintiff)	
)	
v.)	Civil Action No. 04-40193-FDS
)	
UNUM LIFE INSURANCE)	
COMPANY OF AMERICA,)	
)	
Defendant)	

MOTION TO DISMISS

Defendant Unum Life Insurance Company of America, through counsel, hereby moves to dismiss the action pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute and failure to comply with a court order.

In support of this Motion, Defendant states that only one issue remains before the Court in this ERISA action: whether or not Plaintiff is entitled to attorney fees and, if so, in what amount. As discussed below, Plaintiff has now twice failed to file timely a fee petition – notwithstanding the Court’s *sua sponte* extension of the filing deadline. Because Plaintiff missed both deadlines to file a fee petition, Defendant contacted Plaintiff’s counsel to request that the parties stipulate to the dismissal of the action. Plaintiff’s counsel rejected that request and represented that he was going to file belatedly a fee petition during the week of February 25, 2008; Defendants reserved all rights to object to that filing including objections on the basis of untimeliness. Regardless, Plaintiff has still not filed a petition. As a result, the action should be dismissed.

PROCEDURAL HISTORY

1. On September 27, 2004, Plaintiff filed a Complaint to recover disability benefits under a group insurance policy issued by Defendant.

2. Subsequently, Plaintiff elected to have her claim reassessed under the Regulatory Settlement Agreement (“RSA”).

3. On March 3, 2005, the Court stayed the action pending completion of the reassessment of Plaintiff’s claim under the RSA.

4. On September 4, 2007, Plaintiff and Defendant submitted a Joint Status Report to the Court which notified the Court that the RSA had concluded and that Defendant had restored Plaintiff’s benefits under the terms of her disability plan.

5. The Joint Status Report also submitted mutually agreed-to deadlines for resolving the last remaining issue in the case, *i.e.* whether Plaintiff is entitled to recover her attorneys’ fees and costs and, if so, the amount to which she may be entitled. The deadlines jointly submitted by the parties were as follows:

- Plaintiff shall serve an attorney fee demand: September 26, 2007
- Defendant shall serve a reasonable offer: October 15, 2007
- Plaintiff files a Fee Petition: November 14, 2007
- Defendant files Opposition: November 28, 2007

6. Plaintiff failed to serve an attorney fee demand on Defendant and failed to file a fee petition prior to the deadlines set forth in the Joint Status Report.

7. On January 31, 2008, the Court ordered *sua sponte* that Plaintiff file a motion for attorneys’ fees by February 14, 2008.

8. Despite the Joint Status Report, the January 31, 2008 Court Order, and requests by Defendant to do so, Plaintiff has not served an attorney fee demand, filed a fee petition, or filed a motion for attorneys' fees.

ARGUMENT

Plaintiff's action should be dismissed for want of prosecution and for failure to comply with the Court Orders. Rule 41(b) of the Federal Rules of Civil Procedure provides, "[i]f the plaintiff fails to prosecute or to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it." The only issue remaining in Plaintiff's suit is whether Plaintiff is entitled to recover her attorneys' fees and costs and, if so, the amount to which she may be entitled. Because Plaintiff now failed twice to file her motion for attorneys' fees by the Court-ordered deadlines, and, as a result, failed to prosecute the only remaining issue in her case, the action should be dismissed pursuant to Rule 41(b).

WHEREFORE, for the foregoing reasons, Unum Life Insurance Company of America respectfully requests that Plaintiff's action be dismissed.

DATED: March 6, 2008

/s/ Geraldine G. Sanchez
Geraldine G. Sanchez

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*Attorney for Defendant Unum Life Insurance
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Certificate of Conference

I hereby certify that Defendant has complied with the provisions of Local Rules 7.1 prior to filing this Motion.

/s/ Geraldine G. Sanchez

Certificate of Service

I hereby certify that I caused a copy of the foregoing document to be filed with the Court through the Court's ECF system and by overnight mail sent to counsel of record.

DATED: March 6, 2008

/s/ Geraldine G. Sanchez